

11. However, at the February 26, 1991 remanded hearing, Charles Welch changed his tune. There he said that the basis for his August 27, 1987 financial certification was the August 25, 1987 letter from Broadcast. That letter (WRE-Ex. 4) was signed by one Kenneth O. Harris, a Broadcast Vice-President. The letter proved to be nothing more than an accommodation.

12. At the time Welch Communications filed its application, Charles Welch had no personal financial statement. No such statement existed. So he had none to give Broadcast. In fact he has never given Broadcast a personal financial statement, or any other financial documents (Tr. 696). And Broadcast has never asked him for any.

13. At the time Charles Welch certified Welch's finances, he had allegedly made some written calculations about what it would cost to build and operate the station for three months without revenue. But such calculations were informal and not organized. Welch merely jotted some numbers down on legal pads. So he had nothing to submit to Broadcast or anyone else. He never conveyed his handwritten documents to anyone.⁴

14. Conversely, before August 27, 1987, when Welch Communications filed their application, Charles Welch had taken no steps to find out whether Broadcast had \$200,000 - \$250,000 in funds available for him. The only reason he believed Broadcast had the money was because Broadcast had helped fund a station in Tampa, Florida for a friend of his (Tr. 695).

15. Turning to the so-called funds CDC had committed (see Para. 10(2)), the record shows that on August 25, 1987 (two days before he certified) CDC sent Charles Welch a letter along with a resolution of CDC's Board of Directors. The resolution purportedly authorized CDC's Executive Director, Robert J. Webb, Jr. to "borrow" \$26,000 from CDC's "reserve account" to be used "in the purchase of the FM radio station." The resolution further authorized Webb to sign, execute and endorse such documents needed or required to evidence "such equity purchase" (SCRE-8). Since Welch Communications wasn't purchasing any FM radio station, the resolution was of doubtful validity.

16. For his part, Charles Welch says he thought he was going to get a lot more than \$26,000 for their (CDC's) 50% equity (see para. 7 *supra.*), but he didn't know how much more. There was nothing in writing to evidence any such commitment from CDC. Charles Welch admits that giving CDC a 50% equity position in his Swanton proposal was "an act of faith" (Tr. 687-688).

17. As previously noted (para. 12 *supra.*) as of August 25, 1987, Charles Welch had no personal financial statement to give CDC. He has never given CDC any financial documents, and they have never asked him for any.⁵ In fact, at the time, Charles Welch didn't know anything about CDC except from hearsay he understood that CDC was somehow federally funded, county funded, city funded or somehow otherwise funded.

18. Turning to his own personal funds (para. 10(3) *supra.*), Welch's counsel clarified that he (Welch) wasn't going to use any of his personal funds to *prosecute* his proposal, and that he would not be using personal funds for construction and operation expenses. However the record does also show that after CDC formally bowed out of the picture, in order to prosecute the Welch applica-

tion, Charles Welch had to borrow money from his father-in-law, Amos Chester, and from a friend of his, Otis Greene.

19. Charles Welch evidently recognized that the Broadcast August 25, 1987 loan letter was deficient. On or about March 29, 1989, Victor H. Brown gave Charles Welch *another* loan letter. It contained additional terms and changed the proposed interest rate for the loan from 10% to 12%. Most importantly, under the 1989 letter, Broadcast would get a stock warrant interest of up to 30% in Welch Communications, Inc. Charles Welch says that Broadcast never explained the differences between the two letters. Moreover, Welch has never amended its application to reflect this potential 30% ownership change (Tr. 707-708).

20. *Welch 1 - 2 Intermediate Findings.* Welch Communications was not financially qualified on August 27, 1987 when Charles Welch certified that they were. The so-called Broadcast loan letter was valueless; CDC hadn't committed any funds; and Charles Welch didn't personally have the net liquid assets to construct his proposal and operate it for three months without revenue.

21. Moreover, at the time he certified, Charles Welch was familiar with the Commission's net liquid asset test, and he knew what he was certifying to (Tr. 607; 662). So when he certified, he knew that his certification lacked candor at best, and at worst was a calloused misrepresentation.

22. Moreover, the record shows that Welch Communications is still not financially qualified. Broadcast's March 29, 1989 loan letter with its 30% stock warrant interest would substantially change Welch's ownership picture. Consequently, and even if Broadcast's belated March 29, 1989 loan letter were considered, it still wouldn't pass muster. So both Welch-1 and Welch-2 must be decided adversely to Welch Communications.

Welch - 3: Abuse of Process

23. As previously noted (Finding 7 *supra.*) Welch Communications was originally owned 50% by Charles Welch and 50% by the Community Development Center. After CDC withdrew (see *infra.*) in May of 1988, Welch attempted to amend its application to reflect CDC's withdrawal. He filed an amendment on June 23, 1988.

24. In the Hearing Designation Order, the Chief, Audio Service Division noted that Welch's amendment was filed after the last date for filing minor amendments as a matter of right. He then went ahead and accepted the amendment under 47 CFR 1.65. "However," he said, "an applicant may not improve its comparative position after the time for filing amendments as a matter of right has passed. Therefore, any comparative advantage resulting from the amendment[s] will be disallowed." See 55 F.R. 43035 published October 25, 1988, at para. 9.⁶

25. Welch, however, continued to prosecute its application as if Charles Welch were Welch Communications, Inc.'s only principal, ultimately claiming 100% quantitative integration. His attempt to deliberately circumvent the Chief, Audio Services Division's holding earned Welch Communications 0% quantitative integration. See FCC 90D-20 released May 9, 1990, conclusions 8-9.

26. Charles Welch says that he so prosecuted his proposal because his counsel told him "... a legal argument could be made that Welch should receive 100% *quantitative* integration credit for his proposed integration into station management ..."

27. Welch says: that he accepted his counsel's advice, and had his integration statement and direct case exhibits prepared accordingly; that he had no reason to believe that following his attorney's recommendation was in any way improper; that he expected the Presiding Judge would either accept or reject the argument -- not find it an abuse; and that he has not intended to deceive anyone nor abuse the Commission's processes in any respect (WRE Ex. 2, pp. 1-3). He describes his claim for 100% quantitative integration credit as "... merely a routine legal assertion made in the context of a comparative hearing," an assertion "... made in good faith ..."

The Swan Creek Financial Issues: Swan 1 - 2

28. As the Review Board's remand order makes abundantly clear (FCC 90R-68 released August 7, 1990) serious questions about Swan Creek's financial viability came up during the first hearing. It developed that the Swan Creek partners, Jerry Toth and Thomas Gardull, were relying on the same personal assets to construct and operate both their Swanton, Ohio proposal and one for Lima, Ohio as well.

29. At Tr. 326-329, Toth gave the following testimony:

ALJ: ... How are you going to finance both Lima and

Swanton? ... Have you discussed that with Tom?

Toth: Yes, we have discussed it. It has come up and there is no way we could finance both of them.

ALJ: You are going to have to dismiss one of them?

Toth: I don't know if I want to say dismiss, there is a chance that we could combine with another applicant that is down there.

ALJ: Down where, in Lima?

Toth: In Lima, yes. Lima was applied for as a second possibility, should Swanton not be successful ... We had the possibility of a second chance on getting an FM.

ALJ: Do I understand you're saying to me that you are willing to take one of the two? Is that what you are really saying?

Toth: Yes, sir, we are just trying to cover ourselves.

ALJ: And your preference is Swanton over Lima?⁷

Toth: Exactly.

30. A short time later (Tr. 344-345) Toth's partner, Thomas Gardull, testified on the same subject:

Q. Turning to the Lima, Ohio application, if both applications were granted, Mr. Toth testified that you and he had agreed that you did not have enough resources to do both projects. Do you agree with that?

A. I agree with that. Let me back off, there are certainly very cheap ways of putting a radio station on the air and I'm afraid that wouldn't win us a comparative hearing, but there are still ways, that I guess I could put a radio station on the air for next to no money,⁸ being an engineer I have sources of equipment.

31. Toth and Gardull gave the just-quoted testimony (paras. 28-29) on March 17, 1989 (Tr. Vol. 3). On April 25, 1989, Welch moved to enlarge the issues against Swan Creek. Welch sought a financial and a false financial certification issue against Swan Creek. Swan Creek countered, on May 8, 1989, by requesting that the Lima application be dismissed. And in its May 10, 1989 opposition to Welch's enlargement request, Swan Creek said this:

"Swan Creek certified its ability to finance the Swanton station, and later to its ability to finance the Lima station. Never did it certify that it was financially qualified to build both at the same time ... So it never misrepresented anything. Now, however the matter is moot as Swan Creek has dismissed its application ... As the testimony clearly indicates, Lima was applied for as a back-up to the Swanton application (Tr. 328). Although Swan Creek could build both stations, it was never really its intention to do so.

...

Swan Creek is, and always has been, financially qualified to build and operate *at least one of the FM stations for three months without revenue*. It never certified that it was always qualified to build both ..."

32. On May 25, 1989, the Trial Judge denied Welch's enlargement request for either of two reasons. First, he held that Welch's *post - hearing* motion was tardy in the extreme; and secondly, he held that Welch had not demonstrated that Swan Creek had misrepresented their finances or grossly omitted some decisionally significant financial item that would render their proposal totally defective. See FCC 89M-1530 released May 25, 1989.

33. The Trial Judge further addressed the serious character charges Welch had leveled against Toth and Gardull. He said (FCC 89M-1530, *supra*, para. 10):

"... On March 27, 1989, the Presiding Officer had an opportunity to observe Jerry Toth's and Thomas Gardull's demeanor ... He observed nothing that would cause him to doubt their truth and veracity. To the contrary, he was favorably impressed with the testimony of both people. Welch's accusations are without merit ..."

34. As is clear from their remand order, the Review Board ignored the tardiness of Welch's *post - hearing* enlargement allegations, refused to honor the Lima application dismissal, and credited Welch's accusations that Swan Creek may have deceived the Commission by certifying two applications "when it (Swan) appears to know it could only afford to finance (at best) only one."

35. The Review Board not only remanded, they made findings that would severely limit Swan Creek's hearing options at the remanded hearing. They concluded:

"Thus, for more than one year (between at least April 7, 1988 and May 8, 1989) when both of Swan's applications were pending before the Commission, Swan essentially concedes that it was not financially qualified to construct and operate *both* these proposed facilities. Consequently, the affirmative financial certifications contained in both applications could not have been validly operative at the same time."

36. Having been cut off from the benefits that accrued from dismissing the Lima application, Swan Creek (on remand) has fallen back to the *only* position available to it that is consistent with the first evidentiary record. That is the position that Thomas Gardull took at Tr. 344-345 (Finding 39 *supra*.); namely, that Swan Creek was financially qualified to construct and operate both proposals if they employed " . . . very cheap ways . . . " of putting the Lima station on the air " . . . for next to no money" The following findings must be evaluated with that Review Board constraint in mind.

37. Jerry Toth and Tom Gardull estimate that their construction costs for the Swanton operation would be \$108,000, and that they would need \$33,000 for three-months operating expenses. Thus they project a total outlay of \$141,000 for Swanton.

38. Based on a "limited budget" for the Lima proposal, Toth and Gardull claim that the Lima station can be built for \$22,000 and that it can be operated for three months without revenue for \$12,000. Thus, they project a total outlay of \$34,000 for Lima.

39. The estimated total outlay for both the Swanton and Lima proposals would be \$175,000 (\$141,000 plus \$34,000). To meet those expenses Toth and Gardull have agreed to use their own funds along with a promised loan of \$125,000 from Jerry Toth's father, Rudolph Toth. Tom Gardull is to provide \$52,000, and Jerry Toth \$50,000. Thus, if their figures are accepted, Swan Creek would have \$227,000 (\$125,000 plus \$52,000 plus \$50,000) available to meet the \$175,000 projected outlay.

40. Of course, if the Lima application dismissal were credited Swan Creek would have \$227,000 available to meet the Swanton projected costs of \$141,000.

41. However, the foregoing analysis (Findings 37-40 *supra*.) is based on numerous evidentiary assumptions that require additional evaluation.

42. Let's turn first to Tom Gardull's ability to provide \$52,000 in net liquid assets. Gardull's November 1, 1988 balance sheet shows that he has \$90,000 in total assets. This includes \$50,000 for his residence (nonliquid), \$11,000 for a stamp collection (nonliquid), and \$1,000 for electronic equipment. In fact Gardull showed only cash and liquid assets of \$23,000. Mr. Gardull's annual salary at the time Swan Creek filed its application was about \$25,000.

43. Let's turn next to Jerry Toth's ability to provide \$50,000 in net liquid assets. According to his November 10, 1988 balance sheet, he has (1) 4608 45 rpm records worth \$4608; (2) 326 albums worth \$1630; (3) 122 music tapes worth \$1220; (4) Home Entertainment Equipment worth \$2218; (5) 2 vehicles worth \$8,000; (6) Ham Radio

Equipment worth \$4100; and (7) Apple Computer Equipment worth \$950. The liquidity of this \$22,726 is dubious. Toth shows \$25,926 in cash and stocks.

44. As one might assume, Toth's and Gardull's claim that they would construct their Lima proposal for \$22,000 (Finding 38 *supra*) is of doubtful validity. They claim that they had a pre-filing agreement with a Ron Mighell, the CEO of WTLW(TV), Channel 44, that would permit them to operate from WTLW's existing facilities for \$2,000 a month. However, no copy of that agreement was submitted into evidence. Under the purported agreement, Swan Creek would use WTLW's tower, its transmitter building, and its staff to read meters and change audio tapes twice daily. In addition, WTLW would make a small amount of space available to Swan Creek, enough space for a small desk or table and one telephone (Swan Creek Remand Ex. 1 at 5; Tr. 820-821). The following chart shows Swan Creek's construction cost estimates for the Lima proposal:

CHART

Number	Construction Item	Cost	Comment
1	Transmitter building	No cost	Use ch. 44's
2	Install electric	No cost	Use ch. 44
3	Construct tower	No cost	Use ch. 44
4	Purchase coax cable	\$2,000	Used
5	Transmitter/exciter	\$15,000	Used
6	Stereo/generator	\$500	Used
7	Antenna	\$1,000	Used
8	Install coax, antenna	\$1,000	
9	Fence	No cost	Used ch 44's
10	Cable pressure	No cost	Used ch 44's
11	Remote control	No cost	Use ch 44's
12	Audio processing	Not included	
13	Cabinets	\$50	Used
14	Monitors	\$50	Used
15	Generators	No cost	Use ch 44's
		<u>\$20,700</u>	
	Studio		
	Use automation already owned by principal		
	Additional studio equipment	\$1,000	
	EBS	No cost	Used ch 44's
	Installation, wire	\$300	
		<u>\$22,000</u>	

45. Similarly, to Toth and Gardull's \$12,000 three-month cost of operation is also of doubtful validity. The following chart shows an "Estimated Start-up Costs Budget No Frills" for the Lima operation:

CHARTA. Personal

1. No announcers (automated)
2. No office staff (principals do the work)
3. Managers (no salary, not on premises)
4. Sales on commission
5. Payroll taxes based on commissioned employees

No Expense

B. Utilities

1. Telephone one line x \$25 = \$ 25
2. Electric \$300

\$325

C. Legal

1. Royalties \$ 400
2. Insurance \$ 400
3. Fees and Taxes \$ 50
4. Accountant \$ 50

\$900

D. Operations

1. Office supplies \$ 200
2. Printing \$ 50
3. Photocopy \$ 50
4. Miscellaneous 100
5. Channel 44 contract \$2,000

- a. tower
- b. inside rack space
- c. utilize control point

\$2,400

E. Contingency

\$ 375

Total Monthly

\$4,000

Note: Station would be automated with tape; salesmen would work out of their cars, principals would produce programming in Toledo and Channel 44 operators would change tapes twice a day and take meter readings.

46. The paragraph 45 chart along with testimony at the remanded hearing indicates that the Lima "limited budget" operation would have a fully-automated, easy listening format. There would be no employees on the premises: no managers, no announcers, no office staff -- not even a receptionist.

47. Swab Creek would hire two salesmen who would work strictly on commission from their cars. Those salesmen would presumably not be reimbursed for using their vehicles, for their gasoline and oil, and related expenses for three months.⁹ There would be no studio in Lima, and no production facilities.

48. The Lima station programming would consist entirely of pre-recorded music on reel-to-reel tapes that Toth and Gardull prepared in their "spare time" at the Swanton station or in Toth's parents' basement. Those tapes would be mailed or driven to Lima every so often until a library of tapes would accumulate in Lima which could be continuously repeated. Jerry Toth indicated that it wouldn't matter how long it took the tapes to arrive in Lima because they wouldn't contain any timely material anyway.

Issue 1 - The Standard Comparative Issue

49. The findings of fact under the standard comparative issue appear at paragraphs 5-43 of the Initial Decision, FCC 90D-20 released May 9, 1990; they needn't be repeated here. They are not impacted by the remanded hearing. However, the comparative conclusions of law in FCC 90D-20 *supra.*, probably no longer obtain.¹⁰ In any event, comparative findings of fact exist, and there is no need for the appellate body to remand on the comparative issue. See *WFPG, Inc.*, 33 FCC 673 (1962) at para. 13; *Alkima Broadcasting Co.*, 30 FCC 932, 21 RR 732 at Footnote 7; 47 CFR 1.267(b); and 5 USC 557(c)(A).

ULTIMATE FINDINGS OF FACT AND PRELIMINARY CONCLUSIONS OF LAW

1. Welch Communications, Inc. (Welch) and Swan Creek Communications (Swan Creek) remain in the running for FM Channel 297A in Swanton, Ohio.

2. The Review Board has remanded the case. See FCC 90R-68 released August 7, 1990, and we've taken evidence on 5 basic qualifying issues, Welch-1 through Welch-3, and Swan Creek-1, and 2.

Welch - 1 and Welch - 2

3. Under Welch-1 we must determine whether Welch is now and was financially qualified on August 27, 1987 when they filed their application. Under Welch-2 we must determine whether Welch Communications has misrepresented to or lacked candor with the Commission regarding its financial qualifications.

4. The record shows that they were not and are not financially qualified. Originally, Charles Welch said that when he certified to Welch's finances, he was relying on: (1) a so-called loan from Broadcast; (2) a fund commitment from the Community Development Center (DC); and (3) his own personal funds.

5. But the evidence adduced shows that the Broadcast letter was merely an accommodation; the CDC fund commitment was non-existent; and he had to borrow funds from his father-in-law, and a friend in order to personally prosecute the application.

6. Moreover, under Welch-2 the evidence supports the finding that Charles Welch lacked candor with and misrepresented to the Commission regarding Welch Communications' finances. Charles Welch knew what the Commission's financial test was. He knew he was representing that Welch Communications had sufficient net liquid assets available from the committed sources to construct the Swanton FM proposal and operate it for three months without revenue.

7. At the same time Charles Welch so represented he knew that nothing firm had been set up with Broadcast. He had not given Broadcast his personal financial statement because he had no personal financial statement to give. He had nothing in writing, no estimated budget or written cost estimates to give them. And he didn't even know whether Broadcast had the required funds available to give him.

8. The only financial document Charles Welch had from CDC at the time he certified was an August 25, 1987 \$26,000 resolution. But that resolution was for funds to purchase an FM radio station, not prosecute an FM application. In any event Charles Welch thought he was going to get more than \$26,000 from CDC for the 50% equity he had given them. It ended up he didn't even get any of the \$26,000. He admits that at the time he certified Welch's finances, that nothing tangible had been firmed up financially between he and CDC, and that his giving CDC a 50% equity position in Welch Communications was "an act of faith."

9. Finally Charles Welch was fully aware at the time he certified Welch's finances that he didn't have the personal wherewithal to carry out the project. In fact, he didn't even have the funds to continue the prosecution of the Swanton application. He had to borrow funds from his father-in-law and a friend in order to continue that prosecution.

10. In brief, there was no basis for Charles Welch to certify that Welch Communications had the net liquid assets available to construct and operate the Swanton station, and he knew that no such basis existed. So adverse conclusions are warranted under both Welch-1 and Welch-2. Welch Communications was not financially qualified on August 27, 1987 when Charles Welch certified they were; they are not financially qualified now; and they have continually misrepresented otherwise.

Welch - 3: Abuse of Process

11. Under Welch-3 we must determine whether Welch Communications has abused the Commission's processes by intentionally prosecuting a comparative amendment they knew contravened the Hearing Designation Order.

12. When Welch Communications filed their application on August 27, 1987, they represented that, as a stock corporation, they had two owners. Charles Welch purportedly held 50% of the stock (1500 shares) and the Community Development Corporation held the other 50% (1500 shares).

13. However, during the first hearing (FCC 90D-2 *supra.*), it developed that Welch Communications had never elected any corporate officers; that they have no bylaws; that no corporate minutes have been taken; that no stock certificates have been issued; and that no stock subscription agreement had ever been signed. Neither Charles Welch nor CDC ever paid any money to the corporation for their respective 50% stock interests.

14. After filing their ownership representation with the Commission on August 27, 1987, Welch Communications filed nothing with the Commission during the next nine months. But in May, 1988 CDC's attorney advised CDC to pull out of the project because there was "too much at stake for them." CDC then advised Welch by telephone in May 1988 that they were withdrawing from the project. This left Welch as he puts it "... high and dry ..."

15. So Welch filed an amendment with the Chief, Audio Services on June 23, 1988. There he reported that CDC had withdrawn from the project and that he (Charles Welch) was now the 100% owner. While the Chief accepted Welch's amendment for 47 CFR 1.65 reporting purposes, he noted that "an applicant may not improve its comparative position after the time for filing amendments as a matter of right has passed. Therefore any comparative advantage resulting from the amendment will be disallowed."

16. In spite of the Chief's specific admonition Charles Welch has continued to prosecute the application in his capacity as sole (100%) owner of the corporation. He has even claimed 100% quantitative integration based on the amended application. Charles Welch says that he has done so on the advice of counsel; that he expected the Trial Judge to either accept or reject his argument-not find it an abuse; that his 100% quantitative integration claim was "merely a routine legal assertion made in the context of a comparative hearing; and that he made that assertion "... in good faith ..."

17. It is an abuse of process for an applicant to continue to prosecute an application that he knows or has reason to know is no longer viable. That applicant has no right to squander judicial system resources in such a manner. In fact, it is his obligation not to do so. Charles Welch knew that he had lied to the Commission when he represented that the Community Development Center (CDC) owned 50% of Welch Communications Commission. So when CDC (who had never officially been a party to Welch Communications' application) left him "high and dry," Charles Welch knew that his past lies were in imminent danger of being exposed. He consulted his attorney. Lo and behold his attorney advised him to file an untimely amendment changing the ownership structure. But more than that, his attorney not only recommended that he continue prosecuting the bogus application, his counsel told him "... a legal argument could be made that Welch should receive 100% quantitative integration credit for his proposed integration into station management ..."

18. Even so, the abuse of process issue (Welch-3) will be resolved in Welch Communications' favor. In the administrative hearing process there are few individuals who sympathize with (let alone understand) the concept of squandering judicial system resources. There are too few who can visualize the long-range administrative advantages that would accrue from keeping the hearing processes honest. In brief, this is not the type of abuse whose time has come, maybe someday. In any event, we'll look at Welch's alleged abuses as merely routine assertions made in the context of a comparative hearing.

Swan Creek - 1 and Swan Creek - 2

19. Under Swan Creek-1 we must determine whether Swan Creek is and/or was financially qualified to construct and operate their proposed Swanton facility.

20. Jerry Toth and Thomas Gardull filed their Swanton application on August 27, 1987. At that time they were financially qualified to construct and operate their Swanton proposal. They projected a total outlay for Swanton of \$141,000; i.e., \$108,000 in construction costs and \$33,000 for three month's operating expenses (Finding 37 *supra*.).

21. To meet that \$141,000 financial commitment, they had available a \$125,000 loan from Jerry Toth's father (Finding 39 *supra*.), \$23,000 in cash and liquid assets from Gardull (Finding 42 *supra*.) and \$25,926 in cash and stock from Toth (Finding 43 *supra*.).¹¹ Thus, Swan Creek would have \$173,926 available to meet its \$141,000 commitment.

22. But Gardull and Toth apparently weren't content with just their Swanton application. Less than eight months later, on April 7, 1988, they also filed for an FM station in Lima, Ohio.¹² They later dismissed their Lima application on May 8, 1989. But the Review Board has refused to fully credit the Lima dismissal. The Board has rightly and correctly concluded (in the remand order):

"Thus, for more than one year (between at least April 7, 1988 and May 8, 1989) when both of Swan's applications were pending before the Commission, Swan essentially conceded that it was not financially qualified to construct and operate *both* these proposed facilities. Consequently, the affirmative financial certifications contained in both applications could not have been validly operative at the same time."

23. On remand, and having had their hearing options severely curtailed, Toth and Gardull took the position that by adopting and carrying out a no-frills Lima budget, they were, in fact, financially qualified to construct and operate *both* proposals. They argue that based on a "limited budget" they could build the Lima station for \$22,000 and operate for three months without revenue for \$12,000. Thus, they could construct and operate *both* operations for \$175,000; \$141,000 for Swanton and \$34,000 for Lima.

24. First, and *assuming* that Toth and Gardull could construct and operate Lima for \$34,000, that would *not* have qualified them to construct and operate *both* operations. Under the Trial Judge's financial evaluation they would have \$173,926 in net liquid assets available (See Conclusion 21) to meet a \$175,000 total outlay. That's not good enough.

25. Secondly the finding must be made that Toth and Gardull could not effectuate their "no frills" Lima proposal. Both their estimated \$22,000 construction costs and their \$12,000 three months operating expenses are so out of touch with reality as to be classified "inherently incredible." See *Pepper Schultz*, 4 FCC Rcd 6393 (Rev. Bd. 1989).

26. Even *assuming* Toth and Gardull could establish a binding oral agreement themselves and WTLW, their total dependence on *both* the WTLW technical facilities and staff renders their plan so amorphous that it cannot be credited.

27. Similarly, the Trial Judge has no intention of approving an FM operation that has no employees on the premises: no managers, no announcers, no office staff --

not even a receptionist. Nor could he credit a proposal that provides for 2 salesmen working strictly on commission from their cars.

28. Based on the foregoing (paras. 22-27 *supra.*) the preliminary conclusion is entirely justified. Swan Creek was not financially qualified to construct and operate both the Swanton and the Lima FM proposals starting on April 7, 1988. And since the Review Board has refused to credit the May 8, 1989 dismissal of the Lima application, Swan Creek is not now financially qualified to be a Commission licensee. Thus Issue Swan-1 must be resolved against the applicant.

29. However, Issue Swan-2; i.e., the lack-of-candor and misrepresentation issue will be resolved in Toth's and Gardull's favor. Jerry Toth frankly admitted that he and Gardull had applied for Lima as a second possibility should Swanton not be successful; that they were simply trying to cover themselves; and that they preferred Swanton over Lima. That testimony will be credited. As previously noted (Finding 33 *supra.*), the Trial Judge observed Jerry Toth's and Thomas Gardull's demeanor. He found both men creditable. They do not deserve the character stains Welch Communications has heaped upon them.

30. It was a mistake for Toth and Gardull to file for both Swanton and Lima at the same time. But the fact that they erred doesn't automatically brand them liars. There's a vast difference between a mistake and a lie. They have paid for that mistake; i.e., they have been found financially unqualified (Conclusion 28 *supra.*).¹³ We needn't add insult to injury by also inappropriately branding them liars. One can be wrong and truthful at the same time.

ULTIMATE CONCLUSIONS

31. Only basic qualified applicants are entitled to a comparative analysis under the standard comparative issue. Here neither applicant is basically qualified.

32. Welch Communications has failed to demonstrate that they were financially qualified on August 27, 1987 when they filed their application; they have failed to demonstrate that they are financially qualified now; and in trying to cover up their financial (and ownership) defects, they lacked candor with and made affirmative misrepresentations to the Commission. So their application must be denied for any one of three reasons.

33. The other applicant, Swan Creek, has demonstrated that they were financially qualified on August 27, 1987 when they filed their Swanton FM application. But, some eight months later, they botched up their financial qualifications by filing an FM application for Lima. They were not financially qualified to construct and operate both those proposed facilities. That is because, as the Review Board has held: "... the affirmative financial certifications contained in both applications could not have been validly operative at the same time." So Swan Creek is not basically qualified under the financial issue (Swan-1) that has been added against them.

34. Ultimately (See FCC 90D-20 *supra.*, para. 2, Issue 2) the Commission wants us "[t]o determine, in light of the evidence addressed pursuant to the foregoing issues, which of the applications should be granted, *if any*." (Underlining added) Which of the applications should be granted, if any? The answer is neither, and none.

SO, unless an appeal is taken from this Supplemental Initial Decision or the Commission reviews it on its own motion, Welch Communications, Inc.'s application (BPH-870827MY) IS DENIED; AND

Swan Creek Communication's application (BPH-870827NJ) IS DENIED.¹⁴

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

¹ The Board virtually ignored the Trial Judge's ruling on Welch's belated attempt to obtain financial issues against Swan Creek. See FCC 89M-1530, released May 25, 1989.

² The parties evidently felt that a fairly comprehensive record had been made the first time around. They were able to try all five added basic qualifying issues in one day.

³ One of the *basic* problems in this case is that Welch has refused to prosecute its application on the relevant cut-off date ownership structure. Instead they are prosecuting their application based on a June 23, 1988 amendment -one of the amendments that the Hearing Designation Order expressly said they couldn't rely on. See 53 F.R. 43035 published October 25, 1988 at para. 9.

⁴ Before 1987 Broadcast had no financial transactions with Charles Welch or ever lent him any money. However, back in 1985 Charles Welch tried unsuccessfully to purchase WVOI-AM, Toledo, Ohio. At that time he did have some informal discussions with Broadcast, but nothing came of them.

⁵ The closest CDC came to getting involved financially was in February, 1988 -- some six months after the application was filed. They obtained an equipment proposal from the Harris Corporation.

⁶ Under Commission precedent Welch couldn't obtain any comparative advantage from their untimely amendment. But, in addition, they were also charged with any comparative deterioration resulting from that amendment. See *WTAR Radio - TV Corporation et al*, 48 FCC 2d 1147 (1974). This meant that by voluntarily amending CDC out of the Swanton application, Welch lost 50% of its claimed quantitative integration.

⁷ Toth and Gardull filed their Swan Creek application on August 27, 1987. They filed for a new FM station at Lima on April 7, 1988 (Tr. 846).

⁸ Surely Gardull was aware that the Review Board doesn't look kindly on applicants who can put radio stations on the air for a small amount of money. See *Pepper Schultz*, 4 FCC Rcd 6393 (Rev. Bd. 1989). In fact under the existing financial guidelines, as implemented by the Review Board, only the well-to-do need apply. The days of the struggling entrepreneur are long gone.

⁹ By comparison, for its Swanton operation, Swan Creek would employ five announcers and one office clerk. There would be two salesmen working on commission with a minimum wage guarantee, and two managers (Toth and Gardull) on the premises.

¹⁰ The possibility does exist that the Review Board will reject the basic qualifying conclusions that flow from both Findings 7-26 *supra.* (Welch Communications), and Findings 27-47 *supra.* If they do they may wish to fall back on the comparative

conclusions in FCC 90-20 *supra.*, Conclusions 1-10. But from the way the Review Board has structured the remand order, this is unlikely.

¹¹ The Trial Judge assumes that the stock is sufficiently liquid, and therefore can be credited.

¹² Swan Creek had a 1980 population of 3,424. The community lies far enough west of Toledo, Ohio that, at best, it could only be considered part of the Toledo market. Lima, Ohio had a 1980 population of 47,381.

¹³ This is a far cry from numerous other situations where the Commission and its staff have blinked; *e.g.* where an applicant has filed ten or more applications apparently using the same source of financing. Here we have an applicant who applied separately for two communities and honestly intended one of those applications (Lima) to be a back-up. Let them pay the price for their honesty. But we needn't place a character blot on their record.

¹⁴ If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. *See* 47 CFR 1.276(d).